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Supreme Court of the United States.

OCTOBER TERM, 1960.

No. 670

UNITED STATES OF AMERICA, FOR THE USE AND BENEFIT OF ROY BACON,
Petitioner,

v.

JEFFERSON CONSTRUCTION COMPANY ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

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The use plaintiff, Roy Bacon, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered in the above case on October 25, 1960.

Opinions Below.

The memorandum of the District Court appears in the record (R. 35). The opinion of the Circuit Court of Appeals is reported in 283 F. 2d 265. It is printed in the record.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on October 25, 1960 (R. 43). The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254.

Questions Presented.

1. Whether a supplier of materials and labor included within the provisions of 40 U.S.C. Sec. 270b has a right of action against the prime contractor and his sureties for the sums justly due him for material and labor furnished on public projects independently and apart from any contract.

2. Whether a supplier of materials and labor included within the provisions of 40 U.S.C. Sec. 270b has a right of action against the prime contractor and his sureties for the recovery of the sums justly due him when there is a breach of a contract.

3. Whether the supplier of labor and materials included within the provisions of 40 U.S.C. Sec. 270b who has a contract with a sub-contractor of the prime contractor may assert a cause of action against the prime contractor and his sureties under Section 270b and forego the contract.

4. Does the supplier of materials and labor included within 40 U.S.C. Sec. 270b, who has contractual relations with a sub-contractor have the choice of asserting a cause of action against the prime contractor and his sureties under Sec. 270b regardless of the contract or its breach?

Statute Involved.

The statutory provisions involved are contained in 40 U.S.C. Sec. 270b (p. 6539). This section is printed in Appendix A, attached hereto.

Federal Rules of Civil Procedure.

Rules 8(b) and 56 of the Federal Rules of Civil Procedure, 28 U.S.C. (pp. 5135, 5176). These rules are printed in Appendix B, attached hereto.

Statement of the Case.

The use plaintiff brought an action under 40 U.S.C. Sec. 270b (Miller Act) to recover $73,004.58, balance due him for materials supplied and labor furnished at Otis Air Force Base Family Housing Construction, Falmouth, Massachusetts, against Jefferson Construction Company, the prime contractor, and its sureties, and Mel Trucking & Contracting Co. Inc., a sub-contractor of the prime contractor. In keeping with the provisions of 40 U.S.C. Sec. 270a the prime contractor delivered to the United States of America a payment and performance bond as principal and executed by the surety companies named respondents herein as sureties.

The use plaintiff's work consisted primarily of site work, such as digging of trenches and backfilling the same, furnishing and laying of drain and sewerage pipes, furnishing materials for and constructing manholes, and use of his earth-moving equipment.

On the motion of Jefferson Construction Company the Peerless Insurance Company was named a third-party defendant.

The use plaintiff had entered into a sub-contract with the Mel Trucking & Contracting Co. Inc. for performance of the aforementioned work at the Otis Air Force Base, which work was encompassed within the contract between the Jefferson Construction Company and the United States.

The defendant Jefferson Construction Company and its sureties filed an answer (R. 25) admitting allegations contained in paragraphs 2 to 12 inclusive and 17 of the complaint, and stated that as to paragraphs 13, 14, 15, 16 and 18 they were without knowledge or information sufficient to form a belief as to the truth of the allegations con-

tained therein, and denied each and every other allegation contained in the complaint.

The defendant Mel Trucking & Contracting Co. Inc. filed its answer (R. 33) admitting allegations contained in paragraphs 2 to 12 inclusive and 17 of the complaint, and alleged that as to paragraph 16 of the complaint it was without knowledge or sufficient information to form a belief as to the truth of the allegations; as to paragraph 13 it referred to the original of the contract for terms, scope and conditions, and denied each and every other allegation contained in the complaint.

Thereafter the use plaintiff moved for a summary judgment (R. 25) and filed an affidavit (R. 26) pursuant to Rule 56 of the Federal Rules of Civil Procedure. The defendant Jefferson Construction Company filed no counter-affidavit. The defendant Mel Trucking & Contracting Co. Inc. did (R. 33).

The District Court allowed the motion for summary judgment against all defendants based upon the complaint, the answers and the affidavit (R. 35), and rendered judgment (R. 36) against the prime contractor, its sub-contractor and the prime contractor's sureties. It also ordered judgment against the third-party defendant, Peerless Insurance Company, for failure to appear and answer to third party's complaint filed by the prime contractor (R. 36). The defendants appealed to the United States Court of Appeals for the First Circuit from the judgment entered on April 13, 1960 (R. 38), and sought a determination from that Court as to whether the summary judgment was correct in view of the provisions of the contract attached to the use plaintiff's complaint, and whether judgment in favor of the third-party defendant was correct as to form and substance.

The Court of Appeals, on October 25, 1960 (R. 43, 47), vacated the judgment of the District Court, remanding the

action for further proceedings not inconsistent with its opinion, and noted that "The Miller Act does not substitute or furnish a cause of action in a quantum meruit in derogation of the provisions of an express contract."

Specification of Errors.

The Court of Appeals erred—

1. In ruling that the action set forth in the complaint was one of contract rather than a cause of action provided by 40 U.S.C. Sec. 270b.

2. In ruling that the use plaintiff was not entitled to recover on the complaint under 40 U.S.C. Sec. 270b.

3. In ruling that the answer of the Jefferson Construction Company and its sureties was sufficient to avoid the allowance of a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure.

4. In reversing the judgment of the District Court.

Argument and Reasons for Granting the Writ.

1. 40 U.S.C. Sec. 270b (Miller Act) creates a statutory cause of action against the prime contractor and his sureties under the conditions therein prescribed for the benefit and protection of suppliers of material and labor which go into public projects. 40 U.S.C. Sec. 270b is remedial in nature and should be liberally construed to effect the Congressional intent to protect those whose labor and material go into public projects. This rule has been frequently stated.

Fleisher Engineering & Construction Co. v. *United States for the use and benefit of Hallenbeck*, 311 U.S. 15.

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IN THE

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JEFFERSON CONSTRUCTION COMPANY, ET AL., *Respondents.*

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

THE QUESTION PRESENTED

May a sub-subcontractor maintain a claim against the subcontractor for *quantum meruit* where he has an express contract, in disregard of the terms and obligations of his express contract, and may he similarly maintain such a claim against the general contractor and its sureties on their Miller Act bond? or

May a summary judgment be entered in favor of a sub-subcontractor on a public work against the sub-

contractor on the sub-subcontract and against the general contractor and its sureties on their Miller Act bond in the absence of any showing that the sub-subcontractor performed the conditions of his sub-subcontract?

STATEMENT OF THE CASE

Respondent Jefferson Construction Company entered into a contract with the United States for the construction of a public work at Falmouth, Massachusetts. To secure the performance of the work, Jefferson gave a labor and material payment bond, with sureties as required by the Miller Act, 49 Stat. 793 (1935), 40 U.S.C. Sec. 270a. Jefferson then subcontracted a portion of the work to the Mel Trucking and Contracting Co., Inc. Mel Trucking, in turn, entered into a further sub-subcontract with Bacon, the petitioner, for the performance of a portion of the work (R. 6-8).

The contract between petitioner Bacon and Mel Trucking and Contracting Co., Inc., covered in detail the work to be done by the former (R. 9-21). It was based upon estimated quantities and provided for an estimated contract price of $136,292.41 (R. 11). The contract price was made subject to the final measured quantities. Basis and method of computation and payment were to be in accordance with the contract specifications. Petitioner agreed to furnish receipted invoices for all labor and bills for the project showing that the same had been paid in full (R. 11-12).

Petitioner filed an action against Mel Trucking, his immediate subcontractor, and against Jefferson Construction Company, the general contractor, and the latter's sureties. The complaint (R. 6-9) was stated

to have been brought under the provisions of 40 U.S.C. Sec. 270b. Petitioner attached to the complaint a copy of his sub-subcontract with Mel Trucking and alleged that he had furnished labor and material for work under it (R. 9-16, 7). He alleged that notice was given to the general contractor by registered mail as required by the statute and that the action had been brought within the time limited by the statute (R. 8). He alleged that the value of the work, labor, and material furnished by him for which he had not been paid was $73,004.58. He demanded judgment against the general contractor and its sureties as well as against his immediate subcontractor, Mel Trucking and Contracting Co., Inc.

After answers had been filed, petitioner moved for summary judgment upon an affidavit (R. 26) in which he stated that the action was on an express contract and referred to the complaint for a more particular statement thereof. Petitioner's affidavit then went on to state that the labor and material itemized in an attached statement of account "of work performed, material supplied and equipment rental, was done under his supervision or the supervision of his agents and employees * * * " at the site of the project. The affidavit does not contain a direct statement that the material included in the claim was actually supplied by petitioner but only that it was "done under his supervision". Petitioner's complaint makes no claim that petitioner performed his obligations under the sub-subcontract as required by Rule 9(c) of the Federal Rules of Civil Procedure, nor does his affidavit in support of a summary judgment contain such a statement.

An opposing affidavit of the respondent's subcontractor, Mel Trucking and Contracting Co., Inc. (R. 33-34) based in part upon an examination of the records of Mel Trucking by the president of that corporation, stated that petitioner failed to purchase some of the material and failed to make certain payments for health and welfare contributions. The opposing affidavit further alleged that the computation of final measured quantities, as required by petitioner's subcontract (R. 11-12), had not been completed.

The District Court entered judgment against the respondent Mel Trucking and Contracting Co., Inc., presumably upon the sub-subcontract and entered judgment against the respondent Jefferson Construction Company and its sureties on their bond (R. 36-37). A further judgment, not material here, was entered in favor of the general contractor against the surety of Mel Trucking.

The Court of Appeals concluded that petitioner was not entitled to a summary judgment in the absence of a showing that he had complied with the conditions of the contract. The court declined to uphold the judgment on a *quantum meruit* basis in light of the formal contractual relationship between petitioner and the subcontractor Mel Trucking, the terms of which had been fully spread upon the record by petitioner. The Court of Appeals reached its conclusion without reliance upon the opposing affidavit filed by the subcontractor (R. 44-49).

Neither the District Court nor the Court of Appeals commented upon the fact that petitioner's action against Mel Trucking was not a proceeding upon the statutory bond since Mel Trucking was not a party

to that instrument, or upon the absence of any separate allegation of Federal jurisdiction over the claim against Mel Trucking.

ARGUMENT

The statute, 40 U.S.C. 270b(a) (Pet. Br. 10-11), recognizes that claimants on the bond will have a contractual relationship either with the contractor or with a subcontractor. Notice is required when the claimant is a "person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor * * *." Petitioner falls into this category. His right under the statute and bond is to prosecute an action "for the sum or sums justly due him." It cannot be supposed that the statute has created an obligation to pay which would be in conflict with the obligation arising from express contract which the parties made for themselves. Such an interpretation of the statute and bond would throw open for controversy the question of the amount due in every case in which claim is made on the bond. It would enable the contractor and his sureties to contend that the amount to which a materialman might be entitled under his express contract actually exceeded the *quantum meruit* measure. A material supplier who had a profitable contract might find himself subject to the diminution of that profit because it exceeded the fair market value of his material.

It is obvious that the statute was intended to secure payment to the claimant of the amount to which he might be entitled by the contract under which he furnished his labor and material. This is the result which the courts have reached for sixty-five years in their disposition of controversies under the statute and its

predecessor, the Heard Act[1] of 1894. Petitioner cites no case to the contrary.

This Court held in *United States* v. *Carter*, 353 U.S. 210 (1957), that the liability of a surety on a Miller Act bond was to be measured by the terms of the contract for the employment of labor employed on the work entered into by the general contractor. The contract of employment, a collective bargaining contract and master labor agreements governing employment in the area involved, required the contractor to pay contributions to the trustees of a health and welfare fund based upon the rates of wages and hours of employment of the labor. That contract further required the contractor to pay liquidated damages, attorney's fees, court costs, and other related expenses on failure to comply with its terms. Recovery was allowed for all of the claims made by the trustees upon the bond. It was said:

> "The parties have stipulated that contributions to the fund were part of the consideration Carter [the general contractor] agreed to pay for the services of laborers on his construction jobs. The unpaid contributions were a part of the compensation for the work to be done by Carter's employees. The relation of the contributions to the work done is emphasized by the fact that their amount was measured by the exact number of hours each employee performed services for Carter. Not until the required contributions have been made will Carter's employees have been 'paid in full' for their labor in accordance with the collective bargaining agreements." 353 U.S. at 217-8.

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[1] Act of August 13, 1894, 28 Stat. 278, as amended 33 Stat. 811, 36 Stat. 1167. See 40 U.S.C. (1934 ed.) Sec. 270.

This Court also held that the claims for liquidated damages, attorney's fees, court costs, and other related expenses were recoverable upon the bond.

> "The trustees' claim for liquidated damages, attorneys' fees, court costs and other related expenses of this litigation has equal merit. The contractor's obligation to pay these items is set forth in the trust agreement. It is stipulated that they form a part of the consideration which Carter agreed to pay for services performed by his employees. If the employees are to be 'paid in full' the 'sums justly due' to them, these items must be included. Their amount, however, remains to be determined." 353 U.S. at 220.

Recovery was measured exactly according to the terms of the express contract of employment. Petitioner does not undertake to distinguish the *rationale* of the *Carter* case from the theory which he advances. The decision of the court below is squarely within the ambit of the *Carter* case.

The effectiveness of the subcontract provisions is illustrated by *United States* v. *Al-Con Development Corporation*, 271 F. 2d 904 (C.A. 4, 1959). There, in a proceeding under the Miller Act by a subcontractor against a general contractor and the latter's surety, the general contractor insisted upon the enforcement of the arbitration provisions contained in the subcontract. By applicable state law, the contractor was entitled to the benefit of arbitration prior to litigation. The District Court directed a stay in the proceedings until such time as the issues raised by the pleadings had been submitted to arbitration. The action of the court in staying the proceedings was affirmed by the Court of Appeals for the Fourth Circuit.

And a general contractor, when sued upon his Miller Act bond, may offset claims against the labor and material claimant arising from breaches of the latter's subcontract. *United States* v. *George*, 243 F. 2d 83 (C.A. 5, 1957); *Barnard-Curtiss Company* v. *United States*, 244 F. 2d 565 (C.A. 10, 1957).

Rule 9(c) of the Federal Rules of Civil Procedure provides

> "(c) Conditions Precedent. In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity."

Plaintiff failed to plead compliance with the terms of the contract or performance of any conditions precedent. He failed to show that the computation of final quantities had been made as required by the contract or that he had furnished receipted invoices for labor and materials supplied by him. The court below was correct in rejecting petitioner's argument that he need not aver performance of conditions precedent. See also *McAllister* v. *City of Riesel, Texas*, 146 F. 2d 130, 131 (C.C.A. 5, 1945).

Petitioner suggests that there is a conflict between the judgment below and certain decisions in the Tenth Circuit. No such conflict exists. Cases upon which petitioner relies are those in which the claimant's subcontract had been breached during performance and the claimant had elected to treat the breach as ground for rescission. In those cases the claimant's recovery was determined by that compartment of contract law which delineates damages upon rescission. The Court

found nothing in the Miller Act to override the applicable principles of general contract law. Petitioner, however, does not contend that he had a right to rescind the subcontract or that he attempted to exercise that right. His allegations are that the labor and material furnished by him were pursuant to the sub-subcontract.

The result which follows where the material supplier's subcontract has been wrongfully breached and he has elected to rescind for that reason is illustrated by the cases cited by petitioner. *St. Paul-Mercury Indemnity Company* v. *United States*, 238 F. 2d 917 (C.A. 10, 1956); and *Southern Painting Company of Tennessee* v. *United States*, 222 F. 2d 431 (C.A. 10, 1955). In each of these cases the court premised its decision upon preliminary findings that the subcontract had been breached and that the injured party had effectively elected to exercise its right of rescission. Under those circumstances, there being no enforceable subcontract extant, the material supplier is entitled to recover on a *quantum meruit* basis.

Petitioner attempts to bring himself within the ambit of these Tenth Circuit cases by claiming a breach of contract on the part of Mel Trucking (Pet. 8, referring to paragraph 14 of the complaint, R. 8, presumably incorporated by reference in paragraph 2 of the plaintiff's affidavit, R. 26). But the only breach the petitioner claims is failure to pay the contract price, and that does not entitle him to rescission. The rights and obligations of the parties in this suit are determined by the sub-subcontract, as interpreted and applied under appropriate state law, in this case the law of Massachusetts.

It is a general rule of contract law that there can be no recovery on implied contract or quasi-contract in derogation of an express contract. *United States* v. *Ahearn*, 231 F. 2d 353 (C.A. 9, 1955); *Greene* v. *Boston Safe Deposit & Trust Company*, 255 Mass. 519, 152 N.E. 107 (1926). If a contract is broken during the course of its performance, the aggrieved party has three choices (2 Restatement of Contracts [1932], Sec. 350 and Comment a thereto), as follows. First, he may abandon the job (or he may be prevented by the other party's breach from completing), rescind the contract, and recover on *quantum meruit*. *Chicago* v. *Tilley*, 103 U.S. 146 (1880). The election to rescind must be promptly made and clearly manifested. *Jack Mann Chevrolet Co.* v. *Associates Inv. Co.*, 125 F. 2d 778 (C.C.A. 6, 1942). Second, he may abandon the job and claim damages on his contract for the breach. *Phillips and Colby Construction Co.* v. *Seymour*, 91 U.S. 646 (1875); *Millen* v. *Gulesian*, 229 Mass. 27 118 N.E. 267 (1918). Third, he may complete the job under his contract and claim damages for the breach. See *Phillips and Colby Construction Co.* v. *Seymour, supra.*

Where the defendant's only breach, on the other hand, is failure to pay the contract price after the plaintiff's full performance, the plaintiff's only recovery is the contract price. See *Dermott* v. *Jones*, 2 Wall. 1, 9 (1864); *U. S. Potash Company* v. *McNutt*, 70 F. 2d 126 (C.C.A. 10, 1934); *Turner* v. *Buttrick*, 272 Mass. 261, 172 N.E. 246 (1930).

Thus if the petitioner's affidavit sufficiently alleges a breach of contract, it is not the type of breach that would permit him to rescind his express contract and

maintain a claim for the value of his services and materials in disregard of the provisions of his express contract.

CONCLUSION

It is submitted that the Court of Appeals was correct in concluding that the obligations under the subcontract were not destroyed or abrogated by reason of the existence of obligations under the Miller Act. The petition for a writ of *certiorari* should be denied.

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